

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RITA FIFE)	
Claimant)	
VS.)	
)	
BOEING COMPANY)	Docket No. 162,556
Respondent)	
AND)	
)	
AETNA CASUALTY & SURETY COMPANY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Claimant appealed from a February 20, 1997, post-award Order entered by Administrative Law Judge John D. Clark.

APPEARANCES

Claimant appeared by her attorney, Robert R. Lee of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Frederick L. Haag of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Vincent L. Bogart of Wichita, Kansas.

RECORD

The Appeals Board considered the entire administrative file maintained by the Division of Workers Compensation, including the transcript of the February 20, 1997,

Motion hearing held before Administrative Law Judge John D. Clark together with the exhibits attached thereto.

STIPULATIONS

There were no stipulations entered for purposes of this post-award hearing on claimant's motion for attorney fees. However in the Award dated August 25, 1995, it was noted that the Kansas Workers Compensation Fund (Fund) agreed to be responsible for payment of 60 percent of all benefits, compensation, and costs associated with claimant's back injury.

ISSUES

What is a reasonable amount of attorney fees for services rendered claimant post-award?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, and in particular the transcript of the February 20, 1997, Motion hearing and the exhibits introduced into evidence at that hearing, together with briefs of the parties, the Appeals Board finds:

The Order for attorney fees entered by the Administrative Law Judge should be modified. Counsel for claimant introduced two itemized attorney fees statements at the February 20, 1997, Motion hearing. Claimant's Exhibit 1 is a claim covering the period from August 25, 1995 through January 23, 1996, for 8.5 hours of services at an hourly rate of \$125 for \$1,062.50. Claimant's Exhibit 2 is a claim covering the period of January 19, 1996 through January 21, 1997, for 12.75 hours at the same hourly rate for \$1,593.75.

There was no objection to Exhibits 1 and 2 offered by claimant. In connection with the amounts requested by claimant's counsel, counsel for respondent stated:

"So I don't have any argument or I am not going to review, I can't review his statement here. I am sure he has put in what he thinks is a fair amount and I will leave it to Your Honor's discretion as to how much you think is appropriate, if any." (Feb. 20, 1997 Motion hearing transcript at 7)

Without explanation or comment, the Administrative Law Judge entered an Order as follows:

"Attorney fees in the amount of \$200.00 are assessed against the Respondent payable to Claimant's attorney."

Claimant seeks Appeals Board review of the reasonableness of the Order for \$200 in attorney fees for over 20 hours of work. Claimant's counsel points out in his brief that there was no question raised concerning the amount of time claimant's counsel spent in connection with the post-award matters. The Appeals Board notes that there was no indication by the Administrative Law Judge as to what is considered a reasonable hourly rate. Likewise, there is no mention by the Administrative Law Judge or by respondent's counsel to indicate that the \$125-per-hour request by claimant's counsel is unreasonable or excessive. Neither the transcript of the Motion hearing nor the Administrative Law Judge's Order contains any explanation for the amount of fees awarded. There is no argument made that the time spent by claimant's counsel was excessive. There is no argument made that claimant's post-award request for medical treatment was frivolous or unwarranted.

Respondent makes two arguments in its brief to the Board: First, that the determination of the amount to be awarded to claimant's attorney should be within the sole discretion of the Administrative Law Judge without any other recourse or appellate review. Second, attorney fees should not be awarded for time spent pursuing an award of fees. Respondent's counsel cites no authority for either proposition. We note that claimant's counsel has not made a claim for his time spent pursuing this appeal or for the February 20, 1997, hearing before the Administrative Law Judge.

The Fund's argument for affirming the Administrative Law Judge's Order is:

"The courts in the past have been reluctant to award attorney fees where the basic issue being controverted and over which the attorneys fees developed was one which had not been finally answered by either case law or statute."

The Fund's counsel cites no authority for this argument.

K.S.A. 1996 Supp. 44-555c(a) provides in pertinent part that the Workers Compensation Appeals Board "shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the Workers Compensation Act."

K.S.A. 1996 Supp. 44-551(f) provides:

"Except as provided for judicial review under K.S.A. 44-556 and amendments thereto, the decisions and awards of the board shall be final."

K.S.A. 44-536(g) provides:

"In the event any attorney renders services to an employee or the employee's dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and

modification, a hearing for additional medical benefits, or otherwise, such attorney shall be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contract in connection with the original claim, and such attorney fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services and not on a contingent fee basis.”

The Appeals Board does not interpret either K.S.A. 44-536 or K.S.A. 1996 Supp. 44-555c to limit appeals from orders by an administrative law judge concerning post-award attorney fees. The Appeals Board is mindful of and to a certain extent shares the concerns raised by respondent’s counsel concerning the effect that reviewing attorney fee orders may have upon the volume of appeals and upon litigation in general. However, such concerns cannot be used as a basis for limiting any party’s rights of redress. Of course, the reasonableness of the appeal and the value of the services rendered are certainly factors to be considered when determining what a reasonable fee should be.

In this case, counsel for claimant incurred time in connection with requests for post-award medical benefits for claimant. Since this was a post-award matter, claimant’s counsel sought compensation for his services to claimant pursuant to K.S.A. 44-536(g). The fact that counsel for claimant had difficulty obtaining any award of attorney fees in the first instance and thereafter in obtaining a reasonable amount should not, in the opinion of the Board, preclude counsel from pursuing the matter further and receiving reasonable compensation for the time spent in such pursuit. The alternative would be for claimant’s counsel to require claimant to pay for the legal representation of counsel in post-award matters, including requests for medical treatment. This would have a chilling effect upon claimants seeking such benefits. The Board does not think this was what was intended by the legislature when it enacted K.S.A. 44-536(g). See Nordstrom v. City of Topeka, 228 Kan. 336, 613 P.2d 1371 (1980).

The only evidence in the record is that claimant’s counsel has spent 21.25 hours in connection with his attempts to obtain post-award medical treatment for claimant and to obtain a reasonable fee for his services. There is no evidence in this record concerning the reasonable and customary charges for such services in the Wichita area other than claimant counsel’s request for \$125 per hour. On such matters, the trial judge is considered an expert. See City of Wichita v. B G Products, Inc., 252 Kan. 367, 845 P.2d 649 (1993). The Appeals Board has reviewed attorney fees orders entered by administrative law judges in the Wichita area. When based upon time spent, they generally range in amounts from \$75 to \$125 per hour, with \$100 per hour being the most common hourly rate awarded. Thus, the \$125 rate sought by claimant’s counsel is within the range generally awarded and has not been objected to by respondent or the Fund. Accordingly, the Appeals Board finds \$125 per hour to be a reasonable rate upon which to base claimant’s attorney fees in this case. The Appeals Board further finds that claimant’s counsel has spent 21.25 hours providing legal representation to claimant in furtherance of claimant’s interests. Therefore, an award of \$2,656.25 is hereby entered

in favor of claimant and against respondent and its insurance carrier and the Fund as and for claimant's attorney fees in this matter.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the February 20, 1997, Order entered by Administrative Law Judge John D. Clark should be, and is hereby, modified to award claimant's attorney fees in the amount of \$2,656.25 to be paid by respondent, Boeing Company, and its insurance carrier, Aetna Casualty & Surety Company, and the Kansas Workers Compensation Fund pursuant to their respective stipulated percentages of liability.

IT IS SO ORDERED.

Dated this ____ day of June 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Wichita, KS
Frederick L. Haag, Wichita, KS
Vincent L. Bogart, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director